Supreme Court, U.S.
FILED

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No. ~~OFFICE OF THE CLERK~~

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ABDELFATTAH M. ELSHINNAWY - Petitioner

vs.

H. LAWRENCE GARRETT,III - Respondent
Secretary,
Department of the Navy

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

A. M. ELSHINNAWY
Petitioner, PrO-se
397 Stratford Avenue
Collegeville, PA 19426

(610)489-3605

80 pp

QUESTIONS PRESENTED

Simply put: Can an average American (i.e. layman in the law and not rich to afford an attorney) obtain, pro-se, relief from ten years of discrimination, reprisal actions and obstruction of justice by his employer, which resulted in the destruction of his professional career that took a great deal of investment and effort to build? Should the justice system, having been made aware of at least the possibility of major violations of the law, look the other way and use its discretion in the interest of reducing the backlog of cases or should it, in the interest of justice, even walk an extra mile in the judicial process to ascertain at least some of facts before making a decision?

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TABLE OF AUTHORITIES

CASES

None. As a pro-se engineering litigant, so far

I lack the knowledge of properly using the system to compile a list of appropriate cases.

STATUTES

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United States Constitution which guarantees the right for individuals to have a fair day in court to obtain relief from justice.

OTHERS

None. Again, as a pro-se engineering litigant, so far I lack the knowledge of properly using the system to compile a list of appropriate cases.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ABDELFATTAH M. ELSHINNAWY - Petitioner

vs.

H. LAWRENCE GARRETT,III - Respondent
Secretary,
Department of the Navy

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, A. M. Elshinnawy, respectfully prays that a writ of certiorari issue to review the judgement order of the United States Court of Appeals for the Third Circuit: (1) Affirming the order rendered by the United States District Court for the District of New Jersey denying my motion, to the District Court, to reopen discrimination case No. 90-3510 and (2) Costs taxed against appellant.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this petition. The Court of Appeals' denial of the petition for rehearing appears in Appendix B. The opinion of the U.S. District Court for the District of New Jersey appears in Appendix C to this petition. The report and recommendation of Magistrate Judge John J. Hughes, adopted by the District Court for the District of New jersey appears in Appendix E. Other orders needed in support of my petition are mentioned in the appropriate places and are included as appendices.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on February 17, 1994 as shown in Appendix A. A timely petition for rehearing was filed on March 2, 1994. The Court of Appeals' denial of the petition for rehearing was issued on March 17, 1994 as is set forth in Appendix B. This Court's jurisdiction was attested to by the staff of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional right to have a fair day in court for being severly affected by unlawful adverse actions by my previous federal employer, other statutes and provisions involved in the case are set out verbatim where they are appropriately referred to in the text or included as appendices. A complete list is included in the "Table of Authorities" on page iii of this petition.

STATEMENT OF THE CASE

I was born in Egypt on February 1, 1933. I obtained my B.S., with honors, in mechanical engineering and worked in private industry for five years. Then, I decided to come to the United States to further my education. At Columbia University in New York City I obtained my M.S. and Ph.D. in mechanical engineering. I worked in private industry from 1966 to 1982 when I joined the Research and Development Group at the Naval Air Engineering Center (NAEC) in Lakehurst, N.J.. At NAEC I used my education and experience productively to accomplish NAEC's role in the

Navy's mission. Since I joined NAEC, many promotional opportunities were posted yearly for which I applied and was not selected. Very quickly, a discrimination pattern was observed but I chose not to take any formal action against it. However, after more than five years without any advancement whatsoever, I submitted my first EEO complaint and then others followed. These formal actions against discrimination did not result in anything positive. On the contrary, while discrimination continued, reprisal actions were taken against me which intensified as time went on together with some acts of obstruction of justice. After exhausting all administrative remedies in vain, I filed Civil Actio 90-3510 in the U.S. District Court for the District of New Jersey which is the case being brought in front of this Court here.

As a continuation of NAEC's discrimination and other unlawful acts, NAEC terminated my employment in January 1991, at the age of 58, after about two years of an all out effort to gain an upper hand to force me to a total surrender. They started creating extraordinary and unusual

circumstances for me which would make them achieve their goal. They harassed me DAILY, obstructed me from doing my work properly, obstructed justice repeatedly, evaluated my performance to suddenly become unsatisfactory, issued me letters of reprimand, made false accusations and decreased my responsibilities. When this plan failed to produce the result NAEC's management hoped for, NAEC terminated my employment based on fabricated reasons and ridiculous allegations. Although the termination of my employment was a major step for NAEC to reach its goal due to the financial difficulties it created for me, I still continued to search for justice. I started an action with the Merit Systems Protection Board (MSPB) for the termination of my employment, continued with the discovery phase for 90-3510 and followed up on the EEO complaints that I had initiated and which were in various stages. However, as I proceeded with all three legal remedies, NAEC continued its pressure on me by purposefully submitting superfluous motions to the MSPB, requesting the imposition of Rule 11 sanctions against me in 90-3510 and utilizing

deceitful tactics and fabricating lies to investigators of the EEO complaints. The result of all this strained my financial capabilities to a point at which I could not afford to change legal counsel to obtain sound and/or honest legal assistance to continue with the legal action on hand. After suspending my counsel's services (as the record shows) for lack of confidence in him, I had no choice but reinstate him to lead me through the final formalities, with which I was not familiar, of signing an unlawful settlement agreement.

The description given above is a brief summary of the various actions taken by NAEC against me, the tremendous pressure put on me DAILY for about two years and the unlawful tactics utilized by NAEC to increase the cost of litigation for me un-necessarily and unlawfully. As a result of these extraordinary circumstances (Which can be specifically cited and proven if and when the case is opened for trial) and having no knowledge of legal matters at the time, I was not able to proceed pro-se and I had no choice but yield for a total surrender to sign an unlawful out-of-court settlement agreement which is submitted here as Appendix F. This settlement ag-

reement is onesided, was not negotiable and constituted an entrapment. It entailed giving up all my rights for nothing in return and I could not even discuss its terms with my counsel.

Surprisingly to me, both the District Court and the MSPB took the agreement at face value (without considering the total injustice and onesidedness contained in it) and issued orders dismissing both litigations inspite of the fact that both authorities knew of the disaccord between my counsel and me. These orders are submitted here as Appendices D and G.

Having lived through an intensive environment of deceit, lies and fabrication of events by NAEC for about two years culminating into an unjust and unlawful agreement, I proceeded pro-se without knowing the proper legal procedure. I called the Office of the Clerk of the District Court and inquired about the procedure to file a civil action. However, the staff member on the phone informed me that the procedure is so complicated that I needed an attorney. I, therefore, decided to proceed informally. On May 28, 1991 within the time limitations allowed by the orders, I

submitted, pro-se, an informal letter motion to the Honorable Judge Garrett E. Brown,Jr. of the District Court explaining the extraordinary circumstances created by NAEC which forced me to sign the unlawful agreement mentioned above and requested the case 90-3510 to be re-opened. I also filed a civil action in the same District Court (91-2281) concerning the same issues that were before the MSPB. As I personally took these two informal documents to the District Court, I inquired if there was anything else that needs to be done. I was told that concerning 90-3510, the court will do what is needed. However, for 91-2281, I was told that I will receive the summons in the mail which I should mail to the other party as well as instructions for any other deficiencies. A short time later, I received only the summons but no other instructions. 91-2281 was subsequently dismissed without prejudice (which I did not understand what it means) on January 21, 1992 as shown by the dismissal order submitted here as Appendix H. It was refiled and is still in litigation stumbling in procedural matters for more than three years. Concerning

my informal motion to reopen 90-3510, the District Court showed no interest in promoting justice. No action was taken except for the Honorable Judge Brown's letter to my former counsel inquiring of the status of his association with the case. As time went on waiting for an action from the District Court, I learned that a formal motion might bring an action from the court. Immediately, on December 29, 1992 I filed, prose, a formal motion to reopen the case explaining in detail the extraordinary circumstances surrounding the signing of the agreement. As a result, the U.S. Attorney (for the defendant) submitted a memorandom in opposition and an affidavit by NAEC's counsel and I subsequently submitted a reply brief as well as an affidavit by Arlene J. Elshinnawy. On May 24, 1993 I received a"Report and Recommendation" issued May 19, 1993 of Magistrate John J. Hughes concerning the motion. This document, which is submitted here as Appendix E, recommends denial of the motion to reopen based mainly on whether or not I was represented by a counsel at the time the agreement was signed. The document did not address the qu-

ality of representation (and the District Court had ample proof of the very poor quality of such representation and the bad relationship between me and my counsel) or the real extraordinary and compelling reasons which made me sign the agreement. These extraordinary and compelling reasons are described in the informal and formal motions to reopen the case.

Within the time allowed by law, I submitted my "Objections to the Magistrate's Report and Recommendation" to the District Court. In this document I brought out to the attention of the District Court the shortcomings in every statement made in the report on which the recommendation was based. These shortcomings can be simply categorized as: (1) misunderstanding[1] of the facts, (2) reliance on deceitful and untrue statements[1] made by the defendant, (3) missing

[1] This is absolutely true as evidenced by this undeniable proof which is a statement written in a brief submitted by the Assistant U.S. Attorney to the Court of Appeals:

> "The settlement agreement terminating the MSPB case was followed with the MSPB order finding the settlement voluntary and dismissing the case. There was apparently no separate appeal to the MSPB contesting the voluntariness of the settlement and the Magistrate's recitation of this procedure appears to be incorrect."

the point by considering trivial aspects of the issue (namely, mere representation by counsel) rather than the true merit of the motion which is under consideration (namely, the credibility of the defendant and the various acts of discrimination and reprisal committed by the defendant against me that compelled me, without consent, to sign the agreement).

On June 3, 1993 the defendant responded to my objections to the Magistrate's Report and Recommendation by a letter to the Honorable Judge Garrett E. Brown, Jr. Since the letter response reflected a continuation of the defendant's deceitful practices against me for many years, I found it necessary to draw the District Court's attention, again, to the deceit contained in the letter response. I submitted to the District Court, in a timely fashion, a rebuttal to the letter response. The District Court, then, issued its order, submitted here as Appendix C, on June 21, 1993 not to reopen the case. The over-riding objectives of the order is to end the litigation which has been stumbling in the system for about two and a half years due to technicalities and

deceitful statements by the defendant but never attempted to find the truth and promote justice. The order, as it states, is based on the Magistrate's Report and Recommendation, my objections to the Report and Recommendation and the defendant's letter response but not my rebuttal to such a response.

In a timely fashion I filed an appeal, of the District Court's Order, to the U.S. Court of Appeals for the Third Circuit. This action required the District Court to transfer the record of the case to the Court of Appeals. However, as I examined the record transferred, I found that two important documents were missing namely (1) the defendant's letter response mentioned above and (2) my rebuttal to the defendant's letter response. These two documents provide further proof of the defendant's persistent deceit and misleading statements as well as my rebuttal, supported by proof, of the defendant's unethical behavior. Accordingly, on August 19, 1993 I submitted a motion to the District Court to expand the record to include the two document However, on November 12, 1993 the District Court

issued an order denying my motion. This order, which is submitted here as Appendix I, shows that the denial was based on General Rule 12(C) of the General Rules of the District Court. The text of General Rule 12(C) is submitted here as Appendix J.

REASONS FOR GRANTING THE WRIT

I am a layman in the law but since I started handling my litigation against the Navy, three years ago, I have been gaining some legal knowledge. In the process, whatever I have read I find that the"INTEREST OF JUSTICE" is stressed and is paramount. The judgement made by the court system so far (District Court and Court of Appeals) indicates otherwise since: (1) The District Court abused its discretion and the Court of Appeals condoned it. (2) The District Court violated the expediency imposed by 42 U.S.C.S. §2000e-5(f)(2) and 42 U.S.C.S. §2000e-5(f)(5) and the Court of Appeals condoned it. (3) The District Court did not apply Rule 60(b)[2] properly and the Court of Appeals condoned it.

[2]The text of Rule 60 of Fed. R. Civ. P. is submitted here as Appendix K

§2865 of Rule 60 states:

> "The rule says that the court is to act "on motion" and this is the usual procedure. However, the court has power to act in the interest of justice in an unusual case in which its attention has been directed to the necessity for relief by means other than motion."

Before 60 days after the District Court issued its order (submitted as Appendix D) to dismiss the case, on May 28, 1991, I submitted an informal letter motion to the Honorable Judge Garrett E. Brown, Jr. informing him of the unlawful practices and the great injustice committed by NAEC to produce the agreement. I requested that the court reopen the case. However, no action was taken by the District Court till I submitted a formal motion on 12/29/92 i.e. more than 19 months later. Here is this case in which a highly qualified professional was discriminated against for ten years, harassed and subjected to tremendous pressure tactics for a long period of time and finally my career was terminated and ruined suddenly. With these unusual and bold events the District Court abused its discretion by ignoring the interest of Justice which empowers the court to take action

based on any informal motion as is stated above in §2865 of Rule 60. Moreover, this case should not have reached this stage of litigation, dragged over a long period of time, had the District Court refrained from abusing its discretion. The District Court is the proper place for out-of-court settlements to be reviewed, to ascertain that fairness, lawfulness and promotion of justice are achieved in any agreement, before it is acted upon by the court. Again, the District Court abused its discretion. The agreement is onesided and was not negotiable. NAEC gained total victory inspite of its bold unlawful acts and I lost everything simply because I sought in a totally unjust situation. However, the District Court ignored the interest of justice.

The law stresses the urgency and require the courts to act expeditiously on litigation under Title VII. 42 U.S.C.S.§2000e-5(f)(2) states:

> "It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited."

and 42 U.S.C.S.§2000e-5(f)(5) states:

> "It shall be the duty of the judge

> designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure."

Clearly, the District Court failed to comply with the expediency requirements of Title VII litigation. I submitted my informal motion to reopen the case on 5/28/91. The court waited till I submitted the formal motion on 12/29/92 and the Magistrate's Report and Recommendation was issued on 5/19/93.

Obtaining a relief from a judgement is governed solely by Rule 60. The main theme behind the creation of Rule 60 is the <u>interest of justice</u>. The interest of justice is so paramount to the law makers that the rule was modified, some time ago, by adding Clause (6) which enables litigants to obtain relief even under the stringent legal requirement of time limitations. Following are excerpts from Rule 60 applicable to this case.

1- §2857 of Rule 60 states:

> "The cases calling for great libe-

rality in granting Rule 60(b) motions, for the most part, have involved default judgements. There is much more reason for liberality in reopening a judgement when the merits of the case never have been considered than there is when the judgement comes after a full trial on the merits."

2- §2864 of Rule 60 states:

"The rule has significance in two different ways. Clearly it broadens the grounds for relief from a judgement set out in the five preceding clauses. It gives the courts ample power to vacate judgements whenever that action is appropriate to accomplish justice."

3- §2864 also states:

"Regardless of when the motion is made, it is addressed to the discretion of the district court. In general, relief is given under clause (6) in cases in which the judgement was obtained by the improper conduct of the party in whose favor it was rendered or the judgement resulted from the excusable default of the party against whom it was directed under circumstances going beyond the earlier clauses of the rule. The court then considers whether relief under clause (6) will further justice without affecting substantial rights of the parties."

4- §2864 also states:

"There has not been much difficulty in constuing or applying the rule in cases in which the motion is made within a year in judgement. In those cases it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses. These prompt motions for relief are

granted if the court thinks that justice requires it and denied if the court feels otherwise."

5- §2864 continues to state:

> "A quite typical kind of case is that in which a party comes in more than a year after judgement to assert that he is the victim of some blunder by his counsel. Claims of this kind seem to fit readily enough within such grounds as mistake, inadvertence, and excuseable neglect, all stated in clause (1), and courts frequently have so reasoned and held that clause (6) was in-applicable. But if the court is persuaded that the interest of justice so require, it is likely to find aggravating circumstances sufficient to permit to say that the case is properly within clause (6)."

6- The Magistrate's Report and Recommendation discusses my legal representation and the court was satisfied by the fact that I had a legal counsel for two days before the agreement was signed inspite of the fact that my counsel was not present during the signing of the agreement. I drew the court's attention to the quality of representation which obviously from paragraph (5) above, gives reasons for relief from the judgement. Lack of quality of representation is stressed in my informal and formal motions to reopen as well as in my Objections to the Magistrate's Report and Recommendation. However, the court ignored the

issue.

7- From paragraph (1) above, Rule 60 also allows liberal consideration, even for default, by granting relief when the merits of the case never have been considered which is the case here. However, the District Court failed to promote justice again and applied Rule 60 improperly.

8- The District Court did not apply Rule 60 properly when it ignored its power to vacate the judgement to accomplish justice, as stated in paragraphs (2),(3) and (4) above, knowing that total injustice was committed by NAEC in every step that led to this litigation including the agreement.

9- The District Court had no interest in promoting justice. As a result of my motion to reopen this case, two sets of documents were submitted to the court in response to the motion. One set was submitted by me containing all factual statements supported with proofs and the other set was submitted by the defendant and contains deceitful statements, misrepresentations, and untruthful statements i.e. the two sets contained directly opposite statements concerning important

issues such as the assent to the terms of the agreement, the voluntariness to sign the agreement, the number of proposals submitted and considered before the final agreement was signed and an appeal to the MSPB contesting the voluntariness of signing the agreement. Some of the documents in either set were sworn documents and others were not. Inspite of this, the Magistrate Report and Recommendation made definite concluding statements concerning these issues that lined up in favor of the defendant. These concluding statements in the Magistrate's Report and Recommendation were made based on the contradicting statements available in the documents without any further action by the court such as conducting a hearing or any other investigative tool to determine the truth.

10- The District Court also failed to promote justice when it denied my motion to expand the record to add two documents which were submitted to the court as a result of my motion to reopen this case. These two documents are described in enough detail in the "Statement of the Case" section of this petition. One of these doc

uments was referred to in the order that was being appealed to the U.S. Court of Appeals, yet, the District Court refused to make these documents available to the reviewing court. The court's denial of my motion was based on General Rule 12(C) of the General Rules of the District Court. However, the same General Rules state in Rule 1(A) the following:

> "The following General and Admiralty Rules supplement the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Supplemental Rules of Practice for certain Admiralty and Maritime Claims, and are applicable in all proceedings when not inconsistent therewith. They shall be considered as rules for the government of the Court and conduct of causes, and shall be construed to secure a just determination, simplicity in procedure, fairness in administration ant the elimination of unjustfiable expense and delay. Unless otherwise stated, <u>any rule may be relaxed or dispensed with by the Court if adherence will result in surprise or injustice.</u>"

Obviously, the District Court never saw any injustice in refusing to include two important documents in the record so that they would be available to the reviewing court. In the same manner, the District Court never saw any injustice to always rule in favor of the defendant in a case that nothing of its merits (including the

agreement) has been tried hence, not any of the facts is known to the court after more than three and a half years of litigation.

11- The District Court displayed the same concern for justice dealing with the related case 91-2281 as that which I explained in this case. The complaint for 91-2281 was filed in the Office of the Clerk for the District Court on May 28, 1991. The court kept silent till the U.S. Attorney (for the defendant) filed a motion to dismiss the case, for failure to serve the process properly, on 12/27/1991 and the court granted the dismissal by order dated 1/21/1992 i.e. the court kept silent for 7 months inspite of the urgency dictated by law for discrimination cases.

Another perfect proof of how legal proceedings take place in the U.S. District Court for the District of New Jersey as well as in the U.S. Attorney's Office for the District of New Jersey is the following summary of events. As a result of appealing the District Court's ruling for 90-3510 the Court of Appeals issued its order on February 17, 1994, shown as Appendix A, which shows on page 2:

"Costs taxed in favor of appellee,
Secretary of the Navy as follows:
Total Costs . . . . $ 101.80"

This order was based on the Assistant U.S. Attorney's submission, included here as Appendix L, to the U.S. Court of Appeals on February 23, 1994. Nevertheless, on March 30, 1994 the Assistant U.S. Attorney sent me a letter, Appendix M, asking me to pay $ 108.00. On March 31, 1994 the District Court notifies the Assistant U.S. Attorney of the costs in the amount of $ 101.80 (Appendix N). On April 26, 1994 the District Court issues an order for the costs in the amount of $ 104.80 (Appendix O) and onApril 28, 1994, the Assistant U.S. Attorney sent me a letter with a copy of the District Court's order to pay $ 104.80 (Appendix P). This incident is typical of how the proceedings have been for both of my litigations in the District Court and the U.S. Attorney's Office for the last three and a half years.

Surprisingly, though, the United States Court of Appeals affirmed the District Court's actions without explanation. In fact, my presentation of the case to the Court of Appeals seems to have caused dismay in the court to the extend that

it taxed costs against me inspite of all the injustice committed against me and the fact that I have been unemployed for about three and a half years since my employment was terminated by NAEC at the age of 58.

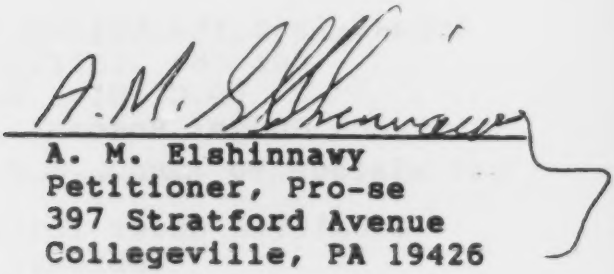
For all these reasons, it is obvious that the justice system failed to produce justice in a situation when I totally trusted it to give me relief from ten years of unlawful discrimination and other civil rights violations.

My petition to this legal institution is my last resort to seek justice. Accordingly, I respectfully request and hope to obtain a relief in thisCourt by supporting my effort to have a fair day in court at which time I will be able to tell my story as it happened.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to affect the judgements rendered by the lower courts in this case to be just and responsive to the gravity of the situation.

Respectfully submitted,



A. M. Elshinnawy
Petitioner, Pro-se
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Phone: (610)489-3605

Dated: June 20, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5434

ABDELFATTAH M. ELSHINNAWY
Appellant

v.

H. LAWRENCE GARRETT, III,
SECRETARY, DEPARTMENT OF THE NAVY

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 90-03510)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
February 11, 1994
Before: MANSMANN, GREENBERG and NYGAARD, Circuit Judges

JUDGEMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Los Mansmann
Circuit Judge

Attest:

P. Douglas Sisk
P. Douglas Sisk, Clerk
Dated: Feb. 17, 1994

Costs taxed in favor of Appellee, Secretary of the Navy as Follows:

Total Costs $101.80

Certified as a true copy and issued in lieu of a formal mandate on March 25, 1994.

Teste:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5434

ABDELFATTAH M. ELSHINNAWY
Appellant

vs.

H. LAWRENCE GARRETT, III,
SECRETARY, DEPARTMENT OF THE NAVY

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINS SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges.

The petition for rehearing filed by appe llant in the above entitled case having been sub mitted to the judges who participated in the dec sion of this court and to all other available ci cuit judges of the circuit in regular active ser vice, and no judge who concurred in the decision having asked for rehearing, and a majority of th circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is den

BY THE COURT,

March 17, 1994

Carol Los Mansmann
Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ABDELFATTAH M. ELSHINNAWY,	:	
	:	
Plaintiff,	:	Civ. No. 90-3510(GEB)
	:	
v.	:	
	:	
H. LAWRENCE GARRETT,III, SECRETARY,DEPT OF THE NAVY	:	ORDER (Entered on the docket 6/22/93)
	:	
Defendant	:	

This matter having come before the Court on plaintiff's motion to reopen the above-captioned action pursuant to Fed.R.Civ.P.60(b)(1); and the matter having been referred to United States Magistrate Judge John J. Hughes pursuant to 28 U.S.C. 636(b)(1)(B) for a Report and Recommendation; and this Court having reviewed the Report and Recommendation issued by Judge Hughes dated May 14, 1993, the record upon which said Report and Recommendation is based, the objections to the Report and Recommendation raised by plaintiff, and defendant's response thereto; and this matter being decided pursuant to Fed.R.Civ.P.78; and it appearing that good cause has been shown;

It is this 21st day of June, 1993,

Ordered that Magistrate Judge Hughes' May 14,

1993 Report and Recommendation be and is hereby ADOPTED as an Order of this Court.

GARRETT E. BROWN,JR., U.S.D.J.

(Filed June 22, 1993

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ABDELFATTAH M. ELSHINNAWY,
Plaintiff :

vs. :

H. LAWRENCE GARRETT, III, : Civil Action No. 90-3510(GEB)
:

It appearing that it has been reported to the Court that the above action has been settled:

It is, on this 4th day of April, 1991, ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within 60 days, to reopen the action if the settlement is not consummated.

GARRETT E. BROWN, JR.,
U.S.D.J.

(Entered on the docket 4/9/91)

(Original filed Apr 08, 1991)

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ABDELFATTAH M. ELSHINNAWY	: Civil Action No. 90-3510(GEB)
Plaintiff,	:
v.	: REPORT AND RECOMMENDATION
H. LAWRENCE GARRETT, III, Secretary, Department of Navy	: (Entered on the docket 5/20/93)
Defendant.	: (Filed May 19, 1993)

HUGHES, Magistrate Judge

This matter comes before the Court on Plaintiff Pro se's motion for an order to reopen this case after execution of a settlement agreement.[1] Defendant opposes the motion. For the following reasons, this Court recommends that Plaintiff's motion to re-open this case be denied.

BACKGROUND

The underlying dispute involves a complaint filed by plaintiff alleging discrimination based on age under the Age Discrimination in Employment Act of 1967, 29U.S.C. 633a (a)-(c), and discrimination based on national origin and color under Title VII of the Civil Rights Act of 1964, 42 U.

[1]Plaintiff is acting pro se on the current motion to re-open the case, but was represented by counsel during the settlement negotiations.

S.C. 2000e-5(f)-(k) and 2000e-16 (a)-(e). Plaintiff, a former mechanical engineer in the Department of Navy, alleges that he was continually passed over for promotions to positions for which he was the most qualified candidate. Plaintiff filed complaints through the Navy's administrative process seeking retroactive promotions with back pay and benefits. Thereafter, in January 1991, Plaintiff alleges that he was terminated from his engineering position for not being a "team player". (Plaintiff's Brief at p. 4)

Plaintiff appealed the dismissal to the Merit Systems Protection Board ("MSPB") and filed an action in this Court. Prior to the MSPB hearing, Plaintiff and Defendant entered into a settlement agreement, signed on March 22, 1991, which included Plaintiff's agreement to resign from his engineering position (as opposed to being terminated) and the voluntary dismissal of this action.

Plaintiff later sought to invalidate the settlement agreement. However, the MSPB found that the settlement was voluntary and denied Plaintiff's request. Plaintiff then filed a new com-

plaint (Civil Action No. 91-2281), alleging that the settlement of this case was made in error. This complaint was dismissed, pursuant to Fed. R. Civ. P. 4, for failure to effect service within 120 days. Plaintiff appealed the dismissal decision of the District Court, and the Court of Appeals for the Third Circuit affirmed the dismissal.

In the current motion, Plaintiff seeks to hav his original case (Civil Action No. 90-3510 (GEB) re-opened based on the contention that the settle ment agreement was one-sided and entered into under duress. (Plaintiff's Reply Brief p.2). Plaintiff alleges that extraordinary and compelling circumstances, orchestrated by the Naval Air Engi neerin Center, forced him to sign the settlement agreement. (Plaintiff's Reply Brief p.2). Plaintiff further states that the extraordinary and compelling circumstances was that, due to economi hardship brought on by his termination, he was unable to be adequately represented by counsel for his litigation and, therefore,he signed the settl ment agreement. (Plaintiff's Reply Brief p.3).

Defendant opposes the motion and asserts that

Plaintiff entered into a valid settlement agreement. Defendant further asserts that Plaintiff cannot claim mistake, as he entered into the agreement with the advice of counsel. Defendant also assert that since Plaintiff filed a second lawsuit to challenge the validity of the settlement agreement, which was dismissed by the District Court and affirmed by the Court of Appeals for the Third Circuit, Plaintiff cannot demonstrate any extraordinary circumstances which would allow for this Court to grant the requested relief, pursuant to Federal Rule 60(b). In addition, Defendant argues that re-opening this case would be futile.[2]

DISCUSSION

Rule 60(b) allows a party to be relieved of a final judgement if there have been extraordinary circumstances manifesting: mistake; inadvertence; surprise; or excusable neglect. See Fed. R. Civ. P. 60(b). In order to ascertain whether Plaintiff's claim meets one of these requirements,

[2]This Court will not address the merits of Plaintiff's case in the underlying action, but will only decide the issue of whether to reopen the case after the parties have entered into a settlement agreement.

we must look to the circumstances surrounding the execution of the settlement agreement.

Settlement agreements are contracual in nature. See Jeff D. v. Andrus,888 F.2d 617, 623 (9th Cir. 1989), opinion replaced 899 F.2d 753, 759 (9th Cir. 1989); Janneh v. Gaf Corp., 887 F.2d 432,436 (2nd Cir 1989), cert. denied, 498 U.S. 865 (1990); Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1016 (D.C. Cir. 1985). See also Nolan v. Lee Ho, 120 N.J. 465 (1990). As such, settlement agreements are subject to the rules of contract formation and interpretation. "A contract is formed where the essential terms of an agreement have been communicated between the parties and there has been mutual assent to those terms." Airmaster Sales Co. v. North Bridge Park Corp, Inc., 748 F.Supp 1110, 1114 (D.N.J. 1990). Thus, the parties must arrive at a "meeting of the minds" as to all essential terms of the contract. Doyle v. Northrup Corp., 455 F.Supp 1318, 1334 (D.N.J. 1978). "A meeting of the mind occurs when there has been a common understanding and mutual assent of all the terms of a contract". Knight v. New England Mutual

Life Insurance Co., 220 N.J. 560, 565 (App. Div. 1987), cert. denied, 110 N.J. 184 (1988).

Consequently, absent any unusual circumstances, this Court should enforce executory agreements to settle litigation. See Haqrish v. Olson, 254 N.J. Super. 133, 137 (1992); Jannarone v. W. T. Co., 65 N.J. Super. 472, 476-77 (App. Div.), cert. denied, 35 N.J. 61 (1961).

"So long as the basic essentials are sufficiently definite, any gap left by the parties should not frustrate their intention to be bound." Id., quoting, Berq Agency v. Sleep World- Willingboro, Inc., 136 N.J. Super. 369, 377 (App. Div. 1975). The court also found that it is the parties objective intent which governs a settlement contract. "A contracting party is bound by the apparent intention he or she outwardly manifests tc the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested." Haqrish, supra; Looman Realty Corp. v. Broad Street National Bank of Trenton, 74 N.J. Super. 71, 82 (App. Div.), cert. denied, 37 N.J. 520 (1962).

There is some disagreement over what role

Plaintiff's counsel had in this case. Plaintiff asserts that 5 weeks prior to the settlement agreement, Mr. Kastner, Plaintiff's counsel, sent a letter to Defendant's counsel, Ms. Trafto informing her that he no longer represented Plai tiff. Nevertheless, the Court is only concerned with counsel's involvement in the settlement process, as it is this agreement that Plaintiff seeks to invalidate.

Mr. Kastner did continue to advise Plaintiff for purposes of the settlement agreement. This is evidenced by Plaintiff's submission of a copy of an invoice from Mr. Kastner's law firm, which details billing for legal services provided to Plaintiff between March 19, 1991 and March 22, 1991, regarding the settlement agreement. (Plain tiff's Reply Brief Ex. 7). Therefore, Plaintiff did receive the benefit of counsel prior to exec uting the settlement agreement.

The sole issue before this Court is whether the settlement agreement, in which Plaintiff agreed to dismiss this complaint, should be in- validated. This Court is mindful that it should enforce agreements to settle, absent any unusual

circumstance. See Hagrish, 254 N.J. Super at 137. It is clear that there were ongoing settlement discussions for a period of time prior to the actual execution of the agreement. Although the parties disagree over the exact number of drafts of the agreement, it is certain that there were at least two preliminary proposals of the agreement. Plaintiff reviewed these agreements with his attorney. Plaintiff also spent 20 to 30 minutes reviewing the final draft, before signing the agreement. (Trafton Aff. n. 9).

Based on all these factors, including the benefit of counsel's advice and various opportunities to review the essential terms of the agreement, this Court must conclude that all terms of the settlement were communicated to Plaintiff and that there had, in fact, been mutual assent.

The Court finds that Plaintiff voluntarily entered into this settlement agreement after careful consideration, and now, based on hindsight, regrets this decision. However unfortunate this situation may be for Plaintiff, it provides no legal justification for re-opening this case.

In view of the foregoing, it is recommended

that the motion to re-open this case be denied.

The Clerk of the Court is directed to mail a copy of this report and recommendation to the parties by regular and certified mail, return receipt requested.

General Rule 40(D)(5) requires that any objection to this Report and Recommendation be filed within 10 days after being served with a copy thereof.

Respectfully submitted,

JOHN J. HUGHES
United States Magistrate
Judge

Dated: May 14, 1993

APPENDIX F

SETTLEMENT AGREEMENT

It is agreed by the Naval Air Engineering Center, Lakehurst, NJ, herein called the Agency, and Abdelfattah M. Elshinnawy, herein called the Appellant, that the following constitutes full and complete settlement of the Merit Systems Protection Board (MSPB) appeal filed by the Appellant in MSPB Case PH04329110352.

1. Appellant will submit, and the Agency will accept, his voluntary resignation from the Agency effective close of business, January 17, 1991, included as Attachment 1. The Appellant will be placed in a leave without pay status for the period from January 4, 1991 until the effective date of the Appellant's voluntary resignation, January 17, 1991. All official documents will be corrected to reflect that Appellant's last day of employment was January 17, 1991. The Appellant is being placed in a leave without pay status at his request as the Appellant believes that being placed on the Agency's rolls entitling him to the 12.1% pay increase effective January 13, 1991, will impact on his high three average salary for purposes of re-

tirement. The Agency specifically indicated to t
Appellant that the Agency believes that the effe
of any pay increase on his high three average sa-
lary for purposes of retirement would be minuscu
2. The Agency will expunge and segregate from th
Appellant's Official Personnel File all documenta
tion relating to the removal action under appeal.
In addition, the Agency will remove from the App
lant's Official Personnel File the Letter of Rep
mand to the Appellant dated July 19, 1990. The A
llant reserves the right to apply for positions
within the Department of the Navy. In the event
the Agency is contacted as a reference by an acti
vity within the Department of the Navy, the Agenc
has the right to speek freely and without reserva
tion. The Agency agrees that any inquiries to ma-
nagement from prospective employers other than an
activity within the Department of the Navy will
be referred to a designated individual other than
the Appellant's former supervisor. The response t
those inquiries will include, to the extent feasi
ble, only the information that appears in the
letter included as Attachment 2. It is understood
that the designated official is not expected to

provide any informationregarding the Appellant that is not truthful.

3. The Appellant agrees to withdraw with prejudice his MSPB appeal, his appeal to the U.S. Districk Court, District of New Jersey, Civil Action No. 90-3510, his EEO complaints, (case numbers listed below) any and all other grievances, arbitrations, appeals, unfair labor practice charges, EEO claims, and administrative or judicial matters currently pending. The Appellant agrees to execute Attachments 3,4, and 5 and any other necessary documentation not provided as an attachment to this Agreement to effectuate the withdrawal of the previous delineated matters. The Appellant understands that by dismissing these matters with prejudice he will be forever barred from raising these matters.

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4. Except as explicitly provided in paragraphs 5 and 6 of this Agreement, the Appellant further agrees not to institute any legal or administrative proceeding, including a claim for an occupational illness/disease or traumatic injury with the US Department of Labor under the federal Employees compensation Act, on issues already raise or that could have been raised prior to the date of this Agreement arising out of or in connection with his employment with the Agency. The Appellan understands that by waiving his right to file a workmans' compensation claim he is forfeiting a potential entitlement to all benefits under the Federal Employees Compensation Act, which could include, upon successful adjudication of a claim, the Appellant receiving compensation benefits for being totally disabled at the rate of 75% of Appellant's salary.

5. The Appellant reserves the right to file an application for disability retirement with the Office of Personnel Management. The Appellant expressly agrees that he will not indicate that the

Agency in any manner caused, and/or aggravated any physical or mental condition which he uses as a basis for his disability retirement application. It is expressly agreed that the Agency will provide Attachment 6, with enclosures, to the Office of Personnel Management as the Supervisor's Statement in connection with Disability Retirement. In the event the Agency is contacted by the Office of Personnel Management for additional information and/or clarification, the Agency agrees not to controvert the Appellant's disability retirement application. In regard to the Agency Certification of Reassignment and Accomodation Efforts, the Agency expressly agrees to provide only the information indicatedon Attachment 7. In the event that additional information is requested by the Office of Personnel Management, the Agency agrees not to provide information to controvert the Appellant's disability retirement application.

6. The Appellant understands that there is no guarantee that he will be entitled to disability retirement. The Appellant understands that he has the burden to prove entitlement to any disability

retirement. As the Office of Personnel Management is the activity which has adjudication authority for disability retirement, the Appellant understands that this Agency will not and cannot indicate the outcome of any disability retirement application the Appellant may file. The Appellant further understands that his dismissal of all litigation pending is not contingent on the approval of his disability retirement.

7. The Appellant agrees that he is responsible for his own counsel fees and all costs he has incurred in this appeal and any and all other matters arising from his employment with the Agency. He and his attorney waive any right to seek any fees or costs from the Agency.

8. The Appellant expressly agrees that under no circumstances will he return as an employee to this Agency currently designated as the Naval Air Engineering Center, Lakehurst, NJ. In the event of Department of Defense reorganization, base consolidation, base closures, or any other potential scenario for which the Appellant may have a right to employment at any activity located geographically at the same location as the Naval Air

Engineering Center, this Agreement constitutes the Appellant's waiver of any employment rights. This Agency or any other agency geographically located at the same location as the Naval Air Engineering Center will not be required to contact the Appellant for acknowledgement of this waiver.

9. The Agency agrees that the Appellant's rating of record for 1989 will be the last rating of record in his Official Personnel File.

10. The Agency with the express agreement of the US Attorney's Office, District of New Jersey, waive its rights to pursue Rule 11 sanctions in Civil Action 90-3510 in the US District Court, District of New Jersey.

11. All parties agree that this Agreement does not constitute an admission by the Agency of any violation of Title VII of the Civil Rights Act of 1964, as amended, or any other federal or state statute or regulation.

12. The terms of this Agreement will not establish any precedent, nor will the Agreement be used by the Appellant to seek or justify similar terms in any subsequent case.

13. This Agreement constitutes the complete understanding of the parties. No other promises or agreements will be binding unless placed in writing and signed by both parties.

14. The Appellant acknowledges that he understands all of the provisions of this Agreement and that he enters it voluntarily, without coercion and with the advice of counsel.

15. The Appellant acknowledges that he understands and is satisfied with the advise of his counsel and that his counsel has fully and completely explained all of the terms of this Agreement.

16. This Agreement will be entered into the record of the Merit Systems Protection Board Case No. PH04329110352, and the Merit Systems Protection Board will maintain jurisdiction.

17. The Appellant will have the right to inspect his Official Personnel File within 45 calendar days after the signing of the Agreement to determine that the Agency has complied with this Agreement.

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A. M. ELSHINNAWY Date Appellant	D.J. RAFFETTO,CAPT, Date USN Commanding Officer Naval Air Engineering Ce
3/22/91	22 Mar. 9
MITCHELL KASTNER,Esq. Date Counsel for Appellant	Rose Trafton,Esq. Da Counsel for Agency

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

ABDELFATTAH ELSHINNAWY, Appellant,	)	DOCKET NUMBER PH04329110352
v.	)	
DEPARTMENT OF THE NAVY, Agency.	)	DATE: March 29, 1991

Mitchell Kastner, Esquire, Philadelphia, Pennsylvania, for the Appellant.

Rose Trafton, Esquire, Lakehurst, New Jersey, for the Agency.

BEFORE

Sandra J. Squire
Administrative Judge

INITIAL DECISION

INTRODUCTION

This is an appeal from a removal action. Abdfattah Elshinnawy was removed from the position of Mechanical Engineer, GS-12. Dr. Elshinnawy worked for the Department of Navy, Naval Air Engineering Center in New Jersey. The appellant requested a hearing but subsequently withdrew that request. The Board has jurisdiction over this appeal by virtue of 5 U.S.C. §4303(e) and 5 C.F.R. §432.206(a).

For the reasons set forth below, the appeal is DISMISSED.

ANALYSIS AND FINDINGS

The parties entered into a settlement agreement which has been placed into the record. As part of the agreement, the appellant withdrew his appeal with the Board. I have reviewed the terms of the settlement agreement and find it lawful and voluntarily entered into. The record reveals that the parties understand the terms of the settlement agreement and that they desire to make the settlement agreement enforceable by the Board. Burton v. Department of Health and Human Service, 45 M.S.P.R. 37(1990). Settlement agreements which are formally entered into the record may later be enforced by the Board. Richardson v. Environmental Protection Agency, 5 M.S.P.R. 248(1981), modified, Shaw v. Department of the Navy, 39 M.S.P.R. 586 (1989), and Hopson v. Defense Logistics Agency, 5 M.S.P.R. 247 (1981).

Since the appeal has been withdrawn pursuant to a settlement agreement, this matter is dismissed from further consideration. See McCuller v. Department of the Interior, 18 M.S.P.R. 665(1984);

Codrington v. Department of Justice, 1 M.S.P.R. 333 (1980).

DECISION

This appeal is DISMISSED.

FOR THE BOARD

Sandra J. Squire
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on May 03, 1991 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial

decision by filing a petition for review if you believe that the settlement agreement is unlawfu was involuntary, or was the result of fraud or mutual mistake. Your prtition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decisio becomes final. If you fail to provide a statemen with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's fina decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely your petition must be received by the court no later than 30 calendar days after the date this

initial decision becomes final.

ENFORCEMENT

If the settlement agreement has been made part of the record, and the agency has not fully complied with the terms of the agreement after this initial decision has become final, you may ask the Board to enforce the settlement agreement by filing a motion with this office.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ABDELFATTAH ELSHINNAWY,	:	
Plaintiff,	:	Civ. No. 91-2281(GEB
v.	:	
H. LAWRENCE GARRETT, III, SECRETARY, DEPARTMENT OF NAVY,	:	MEMORANDUM AND ORDER
	:	(Entered on the docket 1/21/92)
Defendant.	:	(Original filed Jan. 21, 1992)

BROWN, District Judge

Before the Court is defendant's motion to dismiss the complaint without prejudice for plaintiff's failure to make timely and effective service of process on the United States Attorney. For the reasons set forth in this Memorandum and Order, issued pursuant to Fed.R.Civ.P.78, the Court will grant the motion.

BACKGROUND

On May 28, 1991, plaintiff filed this action, alleging that the Navy unlawfully discriminated against him by removing him from his naval engineer position. By letter dated July 24,1991, the United States Attorney, District of New Jersey, conveyed the following information to plaintiff:

> The United States Attorney's office has received a copy of a summons and complaint in this matter on July 2, 1991. Please be advised that to date your attempted service of process is not in compliance with Federal Rules of Civil Procedure 4(d)(4),(5). In order to serve the United States or an agency or officer thereof you must, inter alia, deliver a copy of the summons and complaint to the United States Attorney for this district.

Plf.'s Br., Ex.3 (emphasis in original). Subsesequently, on August 2, 1991, the United States Attorney's office received by certified mail a copy of the summons and complaint. Donnelly Decl., ¶ 2. There are no records of plaintiff attempting service in any other manner. Id., ¶ 3.

DISCUSSION

Under Fed. R. Civ. P. 4(j), plaintiff had until September 27, 1991, or 120 days after filing his complaint, to effect service. Because defendant is an "officer or agency of the United States," it was necessary for plaintiff to serve both the United States and the officer or agency. See Fed. R. Civ. P. 4(d)(5). A plaintiff serves the United States by"delivering" a copy to the United States Attorney's office in the district in which the action is brought and by "sending" a copy to the Attorney General in Washington.

See Fed. R. CIV. P. 4(d)(4). In some circumstances, service may be effected by mail, but servic under Rules 4(d)(4) and 4(d)(5) are not among those circumstances. See Fed. R. Civ. P. 4(c)(2)(C).

Rule 12(j) provides in part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the curt's own initiative with notice to such party or upon motion.

Fed. R. CIV. P. 4(j). Rule 4(j) must be strictly applied. See Hilmon Co. (V.I.) Inc. v. Hyatt Int'l, 899 F.2d 250, 252 (3d Cir. 1990); Lovelace v. Acme Markets, Inc., 820 F.2d 81, 84 (3d Cir.), cert. denied, 484 U.S. 965 (1987). A plaintiff may avoid dismissal only upon a showing of good cause for his failure to serve within the 120 days. See Dominic v. Hess Oil (V.I.) Corp., 841 F.2d 513, 517 (3d Cir. 1988).

Plaintiff has not established good cause for his failure to effect proper service. The letter of July 24, 1991, specifically informed plaintiff that he had not complied with Rule 4, and direc-

ted his attention to Rules 4(d)(4) and 4(d)(5). In opposition to this motion, plaintiff contends that the letter "did not specify that the delivery of the summons and complaint was to be made personally." Yet he already had served the United States Attorney by mail, and that office was informing him that this method was not successful. Thus, he was on notice that service had to be made some other way. In addition, Rule 4(d)(4), to which plaintiff's attention was directed, makes a clear distinction between "delivering" and "sending" process. If that distinction was ambiguous, Rule 4(c)(2)(C) clearly sets forth when service by mail is sufficient.

Because service was not effected within 120 days and plaintiff has not established good cause for his failure to comply with Rules 4(d)(4) and 4(d)(5), "the action shall be dismissed". Fed. R. Civ. P. 4(j).

CONCLUSION

For the forgoing reasons,

It is this 21st day of January, 1992,

ORDERED, pursuant to Fed. R. Civ. P. 4(j), that defendant's motion to dismiss the complaint

be and is hereby GRANTED; and it is

FURTHER ORDERED that the complaint be and is hereby DISMISSED without prejudice.

GARRETT E. BROWN,JR.,U.S.D

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ABDELFATTAH M. ELSHINNAWY,	:	
	:	
Plaintiff,	:	Civ. No. 90-3510(GEB)
	:	
v.	:	ORDER
H. LAWRENCE GARRETT,III, SECRETARY,DEPT OF THE NAVY	:	(Entered on the docket 10/12/93)
Defendant.	:	(Filed Oct. 12, 1993)

This matter having come before the Court on plaintiff's motion pursuant to Fed. R. App.P. 10(e) to expand the record transmitted to the Third Circuit Court of Appeals to include: (1) a copy of defendant the United States' letter in opposition to plaintiff's objections to the Report and Recommendation filed by Magistrate Judge John J. Hughes pursuant to 28 U.S.C. 636(b)(1)(B) on May 14, 1993, denying plaintiff's motion to re-open the above-captioned action, and thereafter adopted as an Order of this Court by Order dated June 21, 1993; and (2) a copy of plaintiff's reply brief to the above-referenced opposition letter; and it being well established that pursuant to General Rule 12(C) of the General Rules of this Court such written submission to the

Court are not a part of the Clerk's file as they are neither sworn statements nor pleadings; and this matter being decided without oral argument pursuant to Fed. R. Civ. P. 78; and good cause having not been shown;

It is this 12th day of October, 1993,

ORDERED that plaintiff's motion pursuant to Fed. R. App. P. 10(e) to expand the record transmitted to the Third Circuit Court of Appeals as set forth above be and is hereby DENIED.

GARRETT E. BROWN,JR.,U.S.D.

dure other than by notice of motion is necessary. An order to show cause which is issued at the beginning of the action may not, however, serve as a substitute for a summons which shall issue in accordance with Rule 4 of the Civil Rules. The order to show cause may include temporary restraints only under the conditions set forth in Rule 65(b) of the Civil Rules.

Applications for orders to show cause, and for consent and *ex parte* orders, shall be made by delivering the proposed orders and supporting papers to the Clerk, who shall promptly deliver each application to the Judge to whom the case has been assigned.

The order shall provide for service upon the opposing party of the order together with all supporting papers, as specified by the Court.

B. **Provisional Remedies Time**

All applications for provisional remedies or a writ of *habeas corpus* or any other emergency relief may be made at any time to the Judge to whom the case has been assigned.

C. **Motion Practice — Generally**

All other applications by notice of motion or otherwise shall be made returnable on a regular argument day before the Judge to whom the case has been assigned.

Except during vacation periods of the Court, the regular argument days are: Camden, the first and third Friday of each month; Newark, the second and fourth Monday of each month; Trenton, the first and third Monday of each month. Unless the Court directs otherwise, it will convene at 10:00 A.M. on argument days. Whenever a regular argument day falls on a holiday, the argument will be heard on the following non-holiday except in Camden where it will be heard on the preceding non-holiday.

Unless otherwise ordered by the Court, the re-

turn day of all motions shall not be later than the second available motion day subsequent to the filing of the motion.

If a motion is noticed for any day other than a regular argument day, unless such day has been fixed by the Court, the Clerk shall list the hearing for the next regular argument day and notify all counsel of the change in date.

No application will be heard unless an original and one copy of the moving papers and a brief prepared in accordance with General Rule 27B, or a statement that no brief is necessary and the reasons therefor, and proof or acknowledgement of service of the brief or statement and the moving papers on opposing counsel are received at the Clerk's office at the place of allocation of the case at least 24 days prior to the date noticed for argument. The brief shall be a separate document for submission to the Court, not attached to the moving papers, and shall note the date for argument on the cover page.

No argument in opposition to the application will be heard unless an original and one copy of an answering brief, specifying the date for argument on the cover page, or a statement that no brief is necessary and the reasons therefor, with proof or acknowledgement of service thereof on opposing counsel is received at the Clerk's office at the place of allocation of the case at least 14 days prior to the date originally noticed for argument, unless the Court otherwise orders.

If the moving party chooses to submit a reply brief, an original and one copy of that brief specifying the date for argument on the cover page, with proof of acknowledgment of service thereof on opposing counsel, must be delivered to the Clerk's office at the place of allocation of the case at least 7 days prior to the date originally noticed for argument.

Immediately on receipt of briefs, the Clerk shall deliver them to the Judge to whom the case has been assigned, except that the Clerk shall reject any brief not received within the time specified by this Rule unless otherwise ordered by the Court.

All motions filed shall have annexed thereto a proposed order. In the event the proposed order is not adequate, the prevailing party, upon direction of the Court, shall submit an order within five days of the ruling on the motion on notice to his or her adversary. Unless the Court otherwise directs, if no specific objection to that order with reasons therefor is received within 7 days of receipt by the Court, the order may be signed. If such an objection is made, the matter may be listed for hearing at the discretion of the Court.

A cross-motion related to the subject matter of the original motion may be filed by the responding party together with that party's opposition and may be noticed for hearing on the same date as the original motion, as long as the responding papers are timely filed. Upon the request of the original moving party, the Court may enlarge the time for filing a reply or a response to the subsequent motion and continue the noticed hearing date.

D. **Motions Pertaining to Discovery**

Motions Pertaining to discovery are governed by General Rule 15C below.

E. **No Prefiling Applications**

No application will be entertained by a Judge in any action until the action has been filed, allocated and assigned.

F. **Motions in Criminal Matters**

Defenses or objections permitted pursuant to Rules 12 and 41(e) of the Criminal Rules shall be made before pleading or within 30 days thereafter unless the Court at the time of arraignment on application of

APPENDIX K

RULE 60. RELIEF FROM JUDGEMENT OR ORDER

Text of Rule 60

(a) Clerical Mistakes. Clerical mistakes in judgements, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notices, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresen-

tation, or other misconduct of an adverse party; (4) the judgement is void; (5) the judgement has been satisfied, released, or discharged, or a prior judgement upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgement should have prospective application; or (6) any other reason justifying relief from the operation of the judgement. The motion shall be made within a reasonable time, and for reasons(1),(2), and (3) not more than one year after the judgement, order,or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgement or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgement, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C.§1655, or to set aside a judgement for fraud upon the court. Writs of coram nobis, coram vobis, audita querels, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgement shall be by motion as prescribed in these rules or by an independent action.

APPENDIX L

February 23, 1994

P. Douglas Sisk, Clerk
U.S. Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Independence Mall West
Philadelphia, PEnnsylvania 19106-1790

Re: Abdelfattah M. Elshinnawy v. Honorable John H. Dalton, Secretary, Department of the Navy, Substituted for H. Lawrence Garrett III
Docket No. 93-5434

Dear Mr. Sisk:

Pursuant to the Notice of Judgement dated February 17, 1994, I am enclosing the original and one copy of the Bill of Costs and Itemized Bill of Costs in this matter.

If you have any questions as to the calculation or content, please feel free to contact me anytime.

MICHAEL CHERTOFF
United States Attorney

By: DOROTHY DONNELLY
Assistant United States Attorney

DD:lp
Enclosures
cc: Abdelfattah M. Elshinnawy
Acting Pro se
397 Stratford Avenue
Collegeville, Pennsylvania 19426 w/encl.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ABDELFATTAH M.ELSHINNAWY,	:	Docket No. 93-5434
Plaintiff-Appellant,	:	
v.	:	ITEMIZED BILL OF COSTS
HONORABLE JOHN H. DALTON SECRETARY, DEPARTMENT OF THE NAVY, SUBSTITUTED FOR H. LAWRENCE GARRETT III	:	
Defendant-Appellee	:	
State of New Jersey)		
)	:	SS
County of Mercer)		

DOROTHY DONNELLY, being duly sworn, deposes and says:

1. I am an Assistant U.S. Attorney for the District of New Jersey and counsel for the appellee, Honorable John H. Dalton, Secretary, Department of the Navy Substituted for H. Lawrence Garrett, III, in the above-captioned case.

2. In this case, appellee filed ten copies of its combined brief and the party (Kathleen L. Colont, plaintiff-appellant) received two copies. The brief totalled 44 pages and was reproduced in-house by means of photocopying at an actual cost of 10 cents per page (under Court Rule 20.1), for a cost of $4.40 a brief x 12 copies = $52.80.

3. Added to this figure are the sums of $25.00 for covers and $2.00 for binding each copy x 12 copies = $24.00.

4. The total costs, pursuant to Court Rule 20, amount to:

$ 52.80	Photocopying
$ 25.00	Covers
$ 24.00	Binding
$101.80	Total

5. Under penalty of perjury, I declare these costs to be true, to the best of my knowledge.

DOROTHY DONNELLY
Assistant United States
Attorney

Sworn and subscribed to before me
this 23rd day of February, 1994

MARGARET S. HERPEL
Notary Public of New Jersey
My commission expires April 11, 1995

APPENDIX M

March 30, 1994

Abdelfattah M. Elshinnawy
397 Stratford Avenue
Collegeville, Pennsylvania 19106

Re: Abdelfattah M. Elshinnawy
v. H. Lawrence Garrett, III, et al.,
Civil Action No. 90-3510
Appeal No. 94-5434

Dear Mr. Elshinnawy:

Enclosed is the Order of the Third Circuit Court of Appeals ordering you to pay costs in the amount of $108.00.

We hereby demand payment of this amount. Kindly draft your check to the Department of the Treasury and send it to me at the above address. If you fail to make payment, I will file a motion to hold you in contempt of court.

Very truly yours,

MICHAEL CHERTOFF
United States Attorney

By: DOROTHY DONNELLY
Assistant United States
Attorney

DD:lp
Enclosure

(402 East State Street,Room 502
Trenton, NJ 08608)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5434

ABDELFATTAH M. ELSHINNAWY
Appellant

v.

H. LAWRENCE GARRETT, III,
SECRETARY, DEPARTMENT OF THE NAVY

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 90-03510)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
February 11, 1994
Before: MANSMANN, GREENBERG and NYGAARD, Circuit Judges

JUDGEMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Los Mansmann
Circuit Judge

Attest:

P. Douglas Sisk
P. Douglas Sisk, Clerk
Dated: Feb. 17, 1994

Costs taxed in favor of Appellee, Secretary of the Navy as Follows:

Total Costs $101.80

Certified as a true copy and issued in lieu of a formal mandate on March 25, 1994.

Teste:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
OFFICE OF THE CLERK

March 31, 1994

REPLY TO:TRENTON

Dorothy J. Donnelly, AUSA
U.S. Attorney's Office
402 East State Street
Room 502
Trenton,NJ 08608

Re: Elshinnawy v. Garrett
Civil Action No. 90-3510(GEB)

Dear Ms. Donnelly:

The mandate on the opinion of the U.S. Court of Appeals for the Third Circuit was filed on March 28, 1994.

Pursuant to General Rule 25, for the U.S. District Court, District of New Jersey, it is requested an order on the mandate be drafted and forwarded to this Office for submission to the Court.

The mandate ordered that the order of the District Court is affirmed showing costs taxed in favor of appellee, Secretary of the Navy, in the sum of $101.80.

Your order on the mandate should set forth the direction contained in the mandate.

Very truly yours,

WILLIAM T. WALSH, CLERK

By: ANNA M. CONNELLY
Deputy Clerk

cc:Honorable Garrett E. Brown,Jr.
Joan Mattis, Courtroom Deputy
Abdelfattah M. Elshinnawy, Pro se
File

APPENDIX O

MICHAEL CHERTOFF
United States Attorney
By: DOROTHY DONNELLY (DD:2545)
Assistant United States Attorney
402 East State Street, Room 502
Trenton, New Jersey 08608
(609) 989-2190

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ABDELFATTAH M. ELSHINNAWY,	: HONORABLE GARRETT E. BROWN, JR.
Plaintiff,	: Civil Action No. 90-3510
v.	: (Entered on the docket 4/26/1994)
H. LAWRENCE GARRETT, III, SECRETARY, DEPARTMENT OF NAVY	: (Original filed APR 26, 1994)
Defendant.	:

ORDER ON THE MANDATE

The United States Court of Appeals for the Third Circuit having entered a judgement order on February 17, 1994, affirming the holding of the United States District Court for the District of New Jersey and having awarded costs to the Defendant, H. Lawrence Garrett, III, Secretary, Department of the Navy, and rehearing having been denied,

IT IS on this 26th day of April, 1994,

ORDERED that plaintiff will pay costs to the defendant in the sum of $104.80 as awarded on appeal.

HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX P

April 28, 1994

Abdelfattah Elshinnawy
397 Stratford Avenue
Collegeville, Pennsylvania 19426

Dear Mr. Elshinnawy:

Enclosed is an order of the court awarding costs in the last appeal. Kindly send your check for the amount awarded to this office. Make your check payable to the Department of the Treasury.

If you fail to make payment I will move to dismiss your presently pending appeal and take all other steps to compel payment.

Very truly yours,

MICHAEL CHERTOFF
UNITED STATES ATTORNEY

by: Dorothy Donnelly
Assistant U.S. Attorney

encl.

MICHAEL CHERTOFF
United States Attorney
By: DOROTHY DONNELLY (DD:2545)
Assistant United States Attorney
402 East State Street, Room 502
Trenton, New Jersey 08608
(609) 989-2190

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ABDELFATTAH M. ELSHINNAWY,	: HONORABLE GARRETT E. BROWN, JR.
Plaintiff,	: Civil Action No. 90-3510
v.	: (Entered on the docket 4/26/1994)
H. LAWRENCE GARRETT, III, SECRETARY, DEPARTMENT OF NAVY	: (Original filed APR 26, 1994)
Defendant.	:

ORDER ON THE MANDATE

The United States Court of Appeals for the Third Circuit having entered a judgement order on February 17, 1994, affirming the holding of the United States District Court for the District of New Jersey and having awarded costs to the Defendant, H. Lawrence Garrett, III, Secretary, Department of the Navy, and rehearing having been denied,

IT IS on this 26th day of April, 1994,

ORDERED that plaintiff will pay costs to the defendant in the sum of $104.80 as awarded on appea.

HONORABLE GARRETT E. BROWN,JR.
UNITED STATES DISTRICT JUDGE